

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 7, 2008 Session

STATE OF TENNESSEE v. MARK ROBERT CARTER

**Appeal from the Circuit Courts for Moore, Lincoln, and Bedford Counties
Nos. 1049, S0700090, and 16207-11 Robert Crigler, Judge**

No. M2007-02706-CCA-R3-CD - Filed May 14, 2009

In August 2007 the defendant, Mark Robert Carter, pled guilty to one count of theft of property valued \$10,000 or more, a Class C felony; nine counts of theft of property valued \$1000 or more, a Class D felony; one count of burglary, a Class D felony, and one count of possession of a Schedule II controlled substance, a Class A misdemeanor. The offenses to which the defendant pled guilty occurred in three different counties over a five-month period. After a sentencing hearing, the trial court ordered some of the defendant's sentences to be served concurrently and some consecutively, resulting in an effective sentence of twenty-six years as a Range II, multiple offender. In this consolidated appeal, the defendant argues that the trial court: (1) improperly sentenced him as a Range II offender for most of his offenses; (2) failed to consider and apply the defendant's proposed mitigating factors; (3) improperly imposed consecutive sentences; and (4) failed to award the defendant pretrial jail credits. After reviewing the record, we conclude that the defendant should have been sentenced as a Range I, standard offender for all of his convictions except for four of his Class D felony theft convictions. However, we conclude that the trial court properly sentenced the defendant to consecutive terms and was within its discretion to consider, but not apply, his proposed mitigating factors. We also conclude that there is not enough information in the record for this court to consider the defendant's jail credit issue on appeal. As such, we remand the defendant's case to the trial court for entry of revised judgments consistent with this opinion; after reducing the defendant's sentencing range to Range I for the appropriate offenses and imposing the midpoint sentences, as did the trial court, the defendant's revised effective sentence is 19.5 years. On remand, the trial court shall also determine the amount of pretrial jail credit to which the defendant is entitled.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Courts Affirmed in Part
and Reversed in Part; Case Remanded**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

Timothy S. Priest, Winchester, Tennessee, for the appellant, Mark Robert Carter.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; and Michael Randles, Ann L. Filer, and Hollyn Hewgley, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Moore County Procedural History

On April 27, 2007, the Moore County Grand Jury indicted the defendant on two counts of theft of property valued \$10,000 or more, six counts of theft of property valued \$1000 or more, four counts of criminal trespassing, and two counts of vandalism valued \$500 or less. The indictment alleged that the offenses occurred on four different dates: December 1, 2005; between February 22 and March 8, 2006; May 8, 2006; and May 12, 2006. On August 20, 2007, the defendant pled guilty to the following offenses:¹

Count #	Offense	Offense Date
1	Theft of property valued \$1000 or more (Class D felony)	12/1/2005
5	Theft of property valued \$1000 or more	between 2/22 and 3/8/2006
8	Theft of property valued \$1000 or more	5/8/2006
12	Theft of property valued \$1000 or more (reduced from indicted offense of theft valued \$10,000 or more)	5/12/2006

The remaining counts of the indictment were dismissed. The defendant left the length and manner of his sentences to the trial court's discretion.

Lincoln County Procedural History

On June 19, 2007, the Lincoln County grand jury indicted the defendant on one count of burglary and two counts of theft of property valued \$1000 or more. The indictment alleged that the offenses occurred on December 20, 2005. At the August 20, 2007 hearing where the defendant pled

¹While the defendant's guilty plea agreement and the transcript of the plea hearing reflect that the defendant pled guilty to Counts 5 and 8 of the indictment, the judgments reflect that these counts were dismissed. "[W]hen there is a discrepancy between what is reflected in the sentencing hearing transcript and what is on the judgment form, the transcript controls." State v. Adrian Porterfield, No. W2006-00169-CCA-R3-CD, 2007 WL 3005349, at *13 (Tenn. Crim. App. Oct. 15, 2007) (citations omitted); no perm. app. filed. On remand, the trial court shall enter corrected judgments that indicate guilty pleas on Counts 5 and 8.

guilty to the Moore County offenses, he pled guilty to one count of burglary, a Class D felony, and the trial court dismissed the theft charges. The defendant left the length and manner of his sentences to the trial court's discretion.

Bedford County Procedural History

On February 22, 2007, the Bedford County grand jury indicted the defendant in five separate cases. In case number 16207, the defendant was indicted on one count of theft of property valued \$10,000 or more. In case number 16208, the defendant was indicted on three counts of theft of property valued \$1000 or more. In cases 16209 and 16210, the defendant was indicted on one count each of theft of property valued \$1000 or more. Finally, in case 16211, the defendant was indicted on one count of possession of a schedule II controlled substance (methamphetamine) with intent to sell and one count of possession with intent to deliver. At the hearing where he pled guilty to the other offenses, the defendant pled guilty in the Bedford County cases as follows:

Case/Counts	Offense(s)	Offense Date
16207	Theft of property valued \$10,000 or more (Class C felony)	1/3/2006
16208, counts 1-3	Theft of property valued \$1000 or more (Class D felony)	2/4/2006 (all 3 counts)
16209	Theft of property valued \$1000 or more	5/11/2006
16210	Theft of property valued \$1000 or more	5/18/2006
16211, count 1	Possession of controlled substance (Class A misdemeanor) (reduced from original charge)	10/25/2006

Count 2 of case 16211 was dismissed. As was the case with his other guilty pleas, the defendant left the length and manner of his sentences to the trial court's discretion.

Sentencing Hearing

At the October 22, 2007 sentencing hearing, the defendant testified that he graduated from high school in 1995, and after graduating, he worked construction jobs before obtaining his Commercial Driver's License and working with his father as an over-the-road trucker. The defendant said that he was steadily employed as a truck driver until March 2005, when he was involved in an accident where his truck overturned. The defendant said that his insurance company paid for the repairs but that his insurance was cancelled after the accident. The defendant said that with the lost income that resulted from being unable to drive the truck—the defendant said that the repairs on the truck were not completed until June or July—he was unable to afford payments on the truck and paying to obtain new insurance on the truck. Therefore, he left the truck driving business. He said that he then began working construction jobs, but that the jobs were infrequent and that he

did not earn as much working construction as he did as a truck driver.

The defendant testified that after he began working construction, he started “running around” with one of his coworkers, Jeff Cantrell. The defendant said that he and Cantrell did drugs together and that Cantrell instructed him as to “how easy it was to steal some stuff.” Around this time, the defendant began his crime spree, which mostly involved his stealing items from various residences, farms, and businesses, a spree which ended with his arrest in October 2006. The defendant said that he was arrested in Marshall County and that at the time of his arrest, he spent most of his time away from the home he shared with his wife and their two young children.

The defendant said that after his arrest, he helped the police in their investigation. The defendant said he helped the police recover most of the items he stole, except for five of the seven cattle he stole from John Teague’s farm, which he could not locate, and some tires he stole from a Moore County business, which he had already sold. He also gave the police information about the other three people involved in the thefts: Cantrell, Brad Davis, and Ellen Sales. The defendant explained that he stole the items because “I got back on drugs. I wasn’t able to support my family with the jobs I was doing. I was just trying to make ends meet”

Regarding his prior criminal history, the defendant said that he had “got[ten] in a little bit of trouble” as a juvenile but that all juvenile charges against him were dismissed when he left his mother and stepfather’s house and went to live with his father. The defendant admitted to a 1996 felony reckless endangerment conviction which resulted from a guilty plea. The defendant said that he was arrested in that case following a drag racing incident. The defendant said that he and another driver “took o[ff] . . . from under a red light and we probably didn’t get over 50 mile[s] an hour, and the city police pulled in behind [the other driver] and pulled him over and then I turned and they c[a]me after me. I r[a]n from them for about five miles.” The defendant explained that the incident occurred at 10:00 or 11:00 at night and that nobody else was in the area at the time. The defendant noted that his only legal troubles between that conviction and his convictions in Missouri were “several misdemeanors . . . mainly all traffic offense[s]”

Regarding his March 2006 convictions in Missouri, the defendant claimed that he and another man, Dale Hill, were “hauling a load of cattle” to Colorado, with Hill driving and the defendant “asleep in the sleeper.”² [Hill] got pulled over and when we got pulled over there was a half marijuana joint in the ashtray. . . . They took us both to jail for that.” The defendant said that he pled guilty to possession of a Schedule VI drug and was sentenced to five years’ probation. He claimed that all charges against Hill were dropped. The defendant said that he had never faced any probation revocations until his arrest in the instant matter.

On cross-examination, the defendant admitted that he began stealing things to support both his family and his methamphetamine habit. He said that another person was driving his truck at the

²According to the “Information” prepared in connection with the defendant’s arrest, this incident occurred in Macon County, Missouri, on February 27, 2005.

time of the accident because his license had been suspended for failure to pay a ticket. The defendant said that the ticket resulted from his payload being over the weight limit, and he believed that the company paying him to haul the cargo would pay the ticket. However, the company did not pay the ticket, a fact he did not discover until his license was suspended. The defendant admitted that he was convicted of theft in both Marshall County and Bedford County.³ Regarding the Bedford County conviction, the defendant said that he received six months' probation, which was revoked after he was arrested in the instant case.

The trial court and counsel for both parties then asked the defendant about his Missouri convictions. The trial court noted that the defendant's record from Missouri indicated that he was convicted of two offenses: possession of a controlled substance except thirty-five grams or less of marijuana, for which the defendant received five years' probation, and possession of up to thirty-five grams of marijuana, for which the defendant received two years' probation. The criminal information prepared in connection with the defendant's Missouri indictment indicates that the other drug found in the truck at the time of the defendant's arrest was methamphetamine; the information does not indicate the amount of either drug found in the truck. The defendant insisted that the only drug found by the police at his arrest was the marijuana in the half-smoked joint, and that he only entered a best interest plea to possession of marijuana, for which he received a sentence of five years' probation. However, the defendant claimed that he never looked at the arrest warrant or indictments in the Missouri case.

The defendant also answered questions about his guilty plea to possession of a controlled substance in the instant Bedford County case. The defendant was originally charged with possession of a Schedule II controlled substance (methamphetamine) with intent to sell or deliver, but the charge was reduced to a misdemeanor upon the defendant's guilty plea. The defendant said that the police recovered two different plastic bags, each containing an "eight ball" of methamphetamine, and the police also found some methamphetamine in a pipe which they found on the defendant's person. The defendant insisted that he was not selling methamphetamine at the time of his arrest.

The defendant's mother, Nancy Carter, and his wife, Misty Carter, both testified on his behalf. Both women said that the defendant appeared sincere in his apologies and that the defendant's children needed him around. Misty Carter reiterated that after the defendant's truck accident, he was increasingly absent from the family, which ultimately led to their separation. Nancy Carter said that she and the defendant's father divorced when the defendant was five years old and that the divorce proved difficult for him. She said that if given the opportunity to pay restitution to the victims, he would do the best he could to pay restitution, which he would be unable to do while incarcerated.

At the conclusion of the sentencing hearing, the trial court imposed the following sentences.

³The presentence report indicates that on March 21, 2007, the defendant pled guilty to theft of property valued \$1000 or more in Marshall County. The listed offense date is August 25, 2006, which was after the events in the instant case. The defendant pled guilty to misdemeanor theft in Bedford County on May 31, 2006. The listed offense date for that offense was February 27, 2006.

The defendant was sentenced as a Range II, multiple offender for his felony convictions:

Moore County	Lincoln County	Bedford County
<p>**Four counts of <u>Theft of Property Valued \$1000 or more</u> (Class D felony): 6 years on each count, sentences to run concurrently</p>	<p>**One count of <u>burglary</u> (Class D felony): 6 years</p>	<p>**Case 16207: One count of <u>Theft of Property Valued \$10,000 or more</u> (Class C felony): 8 years</p> <p>**Cases 16208 through 16210: total of five counts of <u>Theft of Property Valued \$1000 or more</u> (Class D felony): 6 years on each count</p> <p>**Case 16211: One count of Misdemeanor Possession of Controlled Substance: 11 months, 29 days</p> <p>**Sentences in all cases except 16207 to run concurrently, sentence in 16207 to run consecutively to sentences in other cases</p>
<p><u>Total Effective Sentence:</u> 6 years</p>	<p><u>Total Effective Sentence:</u> 6 years</p>	<p><u>Total Effective Sentence:</u> 14 years</p>

The trial court ordered the sentences from each county to run consecutively, resulting in a total effective sentence of twenty-six years. Additionally, the trial court ordered the defendant's sentences in the instant matter to run consecutively to the defendant's four-year theft sentence in Marshall County. The court further ordered that the defendant serve his Tennessee sentences consecutively to his five-year sentence in Missouri. The defendant subsequently filed a timely notice of appeal.

ANALYSIS

Three of the four issues raised by the defendant on appeal concern the length or manner of his sentence. An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave

due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

Sentencing Defendant as Range II, Multiple Offender

The trial court sentenced the defendant as a Range II, Multiple Offender based upon two prior felony convictions: his March 2006 conviction in Missouri for possession of a controlled substance and his August 1996 conviction in Bedford county for reckless endangerment. The defendant argues that while the Missouri offense was committed before the defendant committed the offenses in the instant matter, because the defendant was not convicted of the Missouri offenses until after he committed most of the instant offenses, the trial court’s imposition of Range II sentences for most of his convictions was improper. We agree.

Our sentencing act defines a “multiple offender” as a defendant who has received “[a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable” Tenn. Code Ann. § 40-35-106(a)(1) (2006). The defendant was convicted of Class C and D felonies, so for the defendant to have been sentenced as a Range II offender, the trial court must have found beyond a reasonable doubt that the defendant had two prior felony convictions. The sentencing act defines a “prior conviction” as “a conviction for an offense occurring prior to the commission of the offense for which the defendant is being sentenced.” Id. § (b)(1). Furthermore, the Tennessee Supreme Court has held that for purposes of imposing a sentencing range, “‘prior conviction’ means a

conviction that has been adjudicated prior to the commission of the more recent offense for which sentence is to be imposed.” State v. Blouvet, 904 S.W.2d 111, 113 (Tenn. 1995) (emphasis added).

In this case, the defendant committed his Missouri offenses in February 2005, before he began committing the offenses in the instant case. However, he did not enter a guilty plea in Missouri to felony possession of a controlled substance until March 13, 2006. Thus, he could not have been sentenced as a Range II, multiple offender for those offenses he committed before that date. Specifically, these offenses include his Lincoln County conviction for burglary, which he committed in December of 2005; his Bedford County theft convictions in cases 16207 and 16208, which included offenses committed in January and February of 2006; and his theft convictions on counts 1 and 5 of the Moore County indictment, which included offenses committed in December 2005 and between February 27 and March 8, 2006. We therefore remand this case to the trial court for imposition of sentences as a Range I, standard offender on the appropriate counts.

Consideration and Application of Sentence Enhancement and Mitigating Factors

The only specific issue raised by the defendant regarding the trial court’s consideration and application of enhancement and mitigating factors is that the trial court erred by refusing to apply one of the four mitigating factors proposed at the sentencing hearing. However, while the defendant conceded at the sentencing hearing that all three of the State’s proposed enhancement factors applied, and while the defendant does not challenge their application on appeal, we must consider, in light of the issue concerning the dates of his previous convictions, whether certain enhancement factors apply to all of the defendant’s convictions. In light of these considerations, and mindful that the defendant is to be resentenced as a Range I, standard offender for most of his convictions, we must determine the lengths of sentences that are appropriate for his convictions.

The defendant committed his offenses between December 2005 and May 2006; thus, he was sentenced under the revised sentencing act as enacted by the Tennessee General Assembly in 2005. The act provides:

(c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

- (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
- (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c)(1)-(2) (2006).

The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the court's findings are adequately supported by the record. Id. § (d)-(f); State v. Carter, 254 S.W.3d 335, 342-43 (Tenn. 2008). "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in . . . the Sentencing Act." Carter, 254 S.W.3d at 346. Accordingly, on appeal we may only review whether the enhancement and mitigating factors were supported by the record and their application was not otherwise barred by statute. See id.

In imposing a sentence, the trial court may only consider enhancement factors that are "appropriate for the offense" and "not already . . . essential element[s] of the offense." Tenn. Code Ann. § 40-35-114 (2006). These limitations exclude enhancement factors "based on facts which are used to prove the offense" or "[f]acts which establish the elements of the offense charged." State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994). Our supreme court has stated that "[t]he purpose of the limitations is to avoid enhancing the length of sentences based on factors the legislature took into consideration when establishing the range of punishment for the offense." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997); Jones, 883 S.W.2d at 601.

Enhancement Factors

The State proposed three enhancement factors: "The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"; "The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community"; and "At the time the felony was committed . . . the defendant [was] . . . [r]eleased on probation." Tenn. Code Ann. § 40-35-114(1), (8), 13(C). The defendant conceded that all three factors applied, and the trial court applied them to the defendant's sentences, although the trial court did not state on the record how much weight it gave to each factor.

After reviewing the record, we conclude that the "previous criminal history" enhancement factor applied to all of the defendant's convictions. In addition to the defendant's two prior felony convictions, the presentence report reflects that the defendant has a history of misdemeanor offenses, including multiple traffic offenses. This enhancement factor also applies based upon the defendant's admission to a history of illicit drug use, including the methamphetamine use which contributed in part to the defendant's committing the instant offenses. However, the enhancement factors involving the defendant's failure to comply with the conditions of a sentence involving release into the community and the defendant's committing these acts while on probation cannot apply to the offenses committed before March 13, 2006, the date on which the defendant was convicted and sentenced to probation for his Missouri offenses. These offenses to which only the "criminal history" enhancement factor applies are the ones for which the defendant is to be sentenced as a Range I, standard offender, as outlined above.

Mitigating Factors

The defendant proposed five mitigating factors. At the sentencing hearing, the trial court considered each proposed mitigator and made findings on the record regarding each factor's applicability. The trial court found that the first factor, "The defendant's criminal conduct neither caused nor threatened serious bodily injury," see id. § 40-35-113(1), applied to the defendant's convictions. However, the trial court placed "slight weight" on the factor, noting that "the law . . . inherently takes account of that in setting the range of punishment." The trial court found that the defendant's second proposed mitigator, "The defendant acted under strong provocation," see id. § 40-35-113(2), did not apply as the defendant "acted, at least in large part, out of a drug habit . . . there is no indication that [his] drug habit was anything other than voluntarily initiated."

The defendant proposed two mitigating factors which related to his cooperation with the police after his arrest: "The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses," and "The defendant assisted the authorities in locating or recovering any property or person involved in the crime." See id. § 40-35-113(9), (10). The trial court found that these factors were supported by the record, as the defendant "did plead guilty," "did assist in recovering some of the stolen property," and "made statements as to the others' involvement."

The defendant also proposed the mitigating factor whereby "The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self." See id. § 40-35-113(7). The court noted that the defendant's sense of obligation to provide for his family "may have been some part of it," but the court noted that the defendant "had begun using . . . meth again." Accordingly, the trial court found that this mitigating factor was not supported by the record, a decision which the defendant appeals.

On appeal, the defendant argues that the record supported the application of this mitigating factor and that the trial court erred by not applying it. In support of his argument, the defendant states that "[he] and his wife both testified before the court and clearly indicated that the defendant began his criminal activities after his tractor-trailer rig was damaged in a wreck and was down for several months with repairs." While this statement is true, the record also reflects that the defendant admitted that he resumed his methamphetamine habit after the accident and that he engaged in his criminal activities in part to support his drug habit. In light of this testimony, we conclude that the record supports the trial court's refusal to apply the "support of family" mitigating factor, and therefore the trial court's refusing to apply the mitigating factor did not constitute an abuse of discretion. We also discern no error regarding the trial court's consideration of the other proposed mitigating factors.

Lengths of Sentences

This court must now determine the appropriate lengths of the sentences for those offenses in which the defendant is to be sentenced as a Range I, standard offender. At the sentencing hearing, the trial court, based upon the presence of three enhancement factors and three mitigating factors,

imposed “midpoint” sentences within the appropriate ranges. See Tenn. Code Ann. § 40-35-112(b)(3)-(4) (for defendant sentenced as Range II, multiple offender, sentence range for Class C felony is six to ten years; for Class D felony, the range is four to eight years). Although two of the three enhancement factors no longer apply to the defendant’s Range I sentences, given the minimal weight afforded to the mitigating factors by the trial court and the wide discretion afforded to trial courts in imposing sentences under the revised sentencing act, we conclude that midpoint sentences are appropriate for the defendant’s Range I sentences. Accordingly, on remand the trial court shall enter sentences of three years for each of the defendant’s Class D felony convictions: the Lincoln County burglary conviction, the Moore County theft convictions in counts 1 and 5, and his Bedford County convictions for theft as listed in counts 1 through 3 of case 16208. See Tenn. Code Ann. § 40-35-112(a)(4) (Range I sentence for defendant convicted of Class D felony is two to four years). The defendant’s sentence for his Class C felony theft conviction in Bedford County case 16207 shall be four-and-a-half years. See id. § 40-35-112(a)(3) (Range I sentence for defendant convicted of Class C felony is three to six years).

Consecutive Sentences

The defendant argues that the trial court erred in imposing consecutive sentences. He argues that the two criteria used by the trial court to justify consecutive sentences—the defendant’s extensive criminal history and the fact that he was on probation when he committed these offenses—do not apply, and he further argues that the trial court’s imposition of consecutive sentences is not “the least severe measure necessary to protect the public from the defendant’s future criminal conduct” given his remorse and that the defendant’s offenses did not involve violence. We disagree.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may cause multiple sentences to run consecutively if it finds by a preponderance of the evidence that the defendant “is an offender whose record of criminal activity is extensive” or “is sentenced for an offense committed while on probation.” Tenn. Code Ann. § 40-35-115(b)(2), (6) (2006). The trial court is required to “specifically recite the reasons” behind imposition of a consecutive sentence. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing). In determining whether consecutive sentences are appropriate, the court must be mindful of the sentencing act’s mandate that sentences “should be no greater than that deserved for the offense committed” and “should be the least severe measure necessary to achieve the purposes for which the sentence is imposed.” Tenn. Code Ann. § 40-35-103(2)-(3).

The defendant argues that because he was not on probation when he committed some of his offenses, the trial court erred in imposing consecutive sentences in those cases. While true, the consecutive sentence statute lists the factors in the alternative; only one statutory factor need exist to support the trial court’s imposition of consecutive sentences. While a trial court may only use a defendant’s prior criminal history to enhance the length of an individual sentence, the trial court may use current offenses to justify the imposition of consecutive sentences based upon the criminal

history. See State v. Cummings, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992) (consecutive sentences upheld, based upon “criminal history” factor, for defendant with no prior record of convictions who was convicted of eight crimes in a single trial). This court has followed the holding in Cummings in several subsequent opinions. See generally State v. Carolyn J. Nobles, No. M2006-00695-CCA-R3-CD, 2007 WL 677861, at *12 (Tenn. Crim. App. Mar. 7, 2007), no perm. app. filed; State v. Brian Lee Cable, No. E2005-00608-CCA-R3-CD, 2006 WL 1381484, at *8 (Tenn. Crim. App. May 19, 2006); State v. Monsanto Undrez Cannon, No. M2005-01258-CCA-R3-CD, 2006 WL 16324, at *5 (Tenn. Crim. App. Jan. 4, 2006); State v. Rachel N. Bennett, No. M2002-01215-CCA-R3-CD, 2003 WL 1562090, at *3 (Tenn. Crim. App. Mar. 26, 2003). As such, the trial court’s imposition of consecutive sentences was proper pursuant to section 40-35-115(b).

The defendant also argues that the trial court’s imposition of consecutive sentences was excessive. However, in sentencing the defendant, the trial court announced that “consecutive sentences should be considered in relation and imposed in relation to the severity of the offenses and in order to protect the public from further criminal acts by the [d]efendant. The court is mindful of that and feels that some consecutive sentencing is appropriate for that reason.” The trial court’s consideration of the principles of sentencing is further evident through the fact that the trial court could have ordered that the defendant serve the maximum term for each of his convictions and ordered all sentences to run consecutively—resulting in a total effective sentence of seventy-four years, eleven months, and twenty-nine days as a Range II offender—but it elected not to do so. Thus, we conclude that the trial court did not err in imposing consecutive sentences. Given this conclusion, and in light of the sentences we established earlier in this opinion, on remand the defendant’s total effective sentence in the instant matter will be nineteen-and-a-half years, with this sentence to be served consecutively to the defendant’s sentences in Marshall County and in Missouri.

Pretrial Jail Credits

The defendant’s final contention is that the trial court failed to give him pretrial jail credits. The defendant was arrested in October 11, 2006, and did not make bond before the sentencing hearing in the instant matter. The judgments in this case do not reflect pretrial jail credits.

Tennessee Code Annotated section 40-23-101(c) provides for a defendant to receive pretrial jail credits:

The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail . . . or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

However, while the defendant appears likely to be entitled to pretrial jail credits, we are unable to

make that determination based upon the record on appeal. The record reflects that on March 21, 2007, before the sentencing hearing in the instant case, the defendant was convicted in Marshall County of theft of property valued \$1000 or more, an offense which occurred on August 25, 2006. Thus, the defendant may have been awarded pretrial jail credits for his Marshall County offense—or, if not awarded, the jail credits he seeks in this case may have been applicable to that case, rather than the instant one. Given the statutory requirement that a defendant be awarded pretrial jail credit and our inability to resolve the issue, on remand the trial court shall determine the amount of pretrial jail credit to which the defendant is entitled, if any.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, we conclude that the trial court erred in sentencing the defendant as a Range II, multiple offender for those offenses he committed before he was convicted in and sentenced to probation for his Missouri offenses. We also conclude that the trial court erred in applying two enhancement factors to those convictions, but that this error in applying enhancement factors was ultimately harmless. Furthermore, we conclude that the trial court properly imposed consecutive sentences and that we are unable to address the defendant's pretrial jail credit issue given an insufficient record. We therefore remand the case to the trial court for imposition of Range I sentences on the appropriate counts. As the sentences will remain "midpoint" sentences, the total effective sentence on remand will be nineteen-and-a-half years. On remand, the trial court shall also enter revised judgments on Counts 5 and 8 in the defendant's Bedford County case to accurately reflect that the defendant pled guilty to those offenses. Finally, the trial court is to determine the amount of pretrial jail credit to which the defendant is entitled, if any.

D. KELLY THOMAS, JR., JUDGE